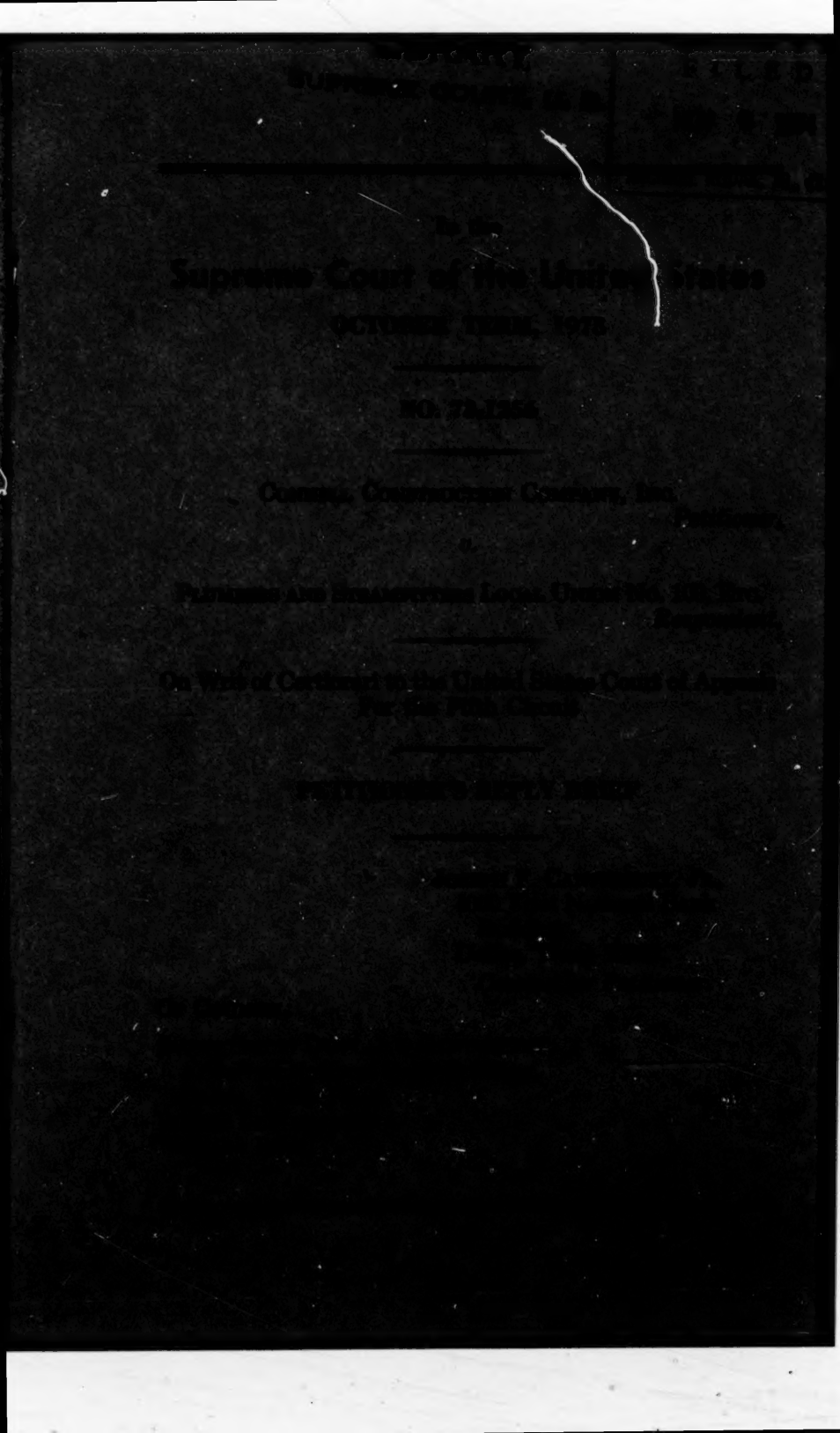

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In the

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.
Petitioner,

v.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, ETC.
Respondent.

PETITIONER'S REPLY BRIEF

UNION'S ATTEMPT TO CONFUSE THE NATURE OF THE SUBJECT AGREEMENT

Both Respondent (UNION) and its Amicus (AFL-CIO) seek to cloud the nature of the subject agreement[1] by asserting that UNION was only trying to protect wage scales and reduce competition based on wages. AFL-CIO quotes the erroneous statement of the Court of Appeals to the effect that unions have succeeded in eliminating competition based on lower wage scales (AFL-CIO Br. p. 2). UNION also attempts to catagorize the subject Agreement as a wage protective agreement by referring to self-serving language in UNION's standard forwarding letter sent with the sub-

[1] The term "subject agreement" refers to the boycott agreement between UNION and CONNELL (Pl. Exb. 4, A. 62, 114) — not to any collective bargaining agreement.

ject agreement (Pl. Exb. 2, A. 110), (Resp. Br. 3). These statements regarding elimination of competition based on wages are not supported by the record which is void of any evidence on the wage scales of those mechanical contractors UNION has forced CONNELL to boycott. However, UNION's Business Agent, Patterson, testified that he had been unsuccessful in organizing Texas Distributors' a mechanical firm with whom CONNELL had done business (A. 52-3, 108). Presumably the employees of Texas Distributors preferred their wages to those offered by UNION. Some mechanical firms without a collective bargaining agreement with UNION may well pay their employees more than UNION's wage scale. In fact, UNION'S MASTER AREA AGREEMENT prevents employers from paying in excess of the established union scale.

UNION's argument that the subject agreement is simply to eliminate competition based on wage scales makes a mockery of the concept of legitimate union interests. If UNION's argument succeeds in this case, then any future union activity, no matter how destructive of employee's rights and the distinction between employers as established by this Court in *Denver Building Trades Council v. NLRB*, 341 U.S. 675 (1951), and regardless of the extent of restraint of trade[2], can be justified merely by the unsupported and unrealistic claim of ultimate goals without regard to the manner in which these goals are accomplished and their impact upon employees, employers and the public. It would also result in complete destruction of the careful balance between labor and anti-trust legislation established by this Court and Congress over the years.

UNION's goal is clear. It is not to eliminate competition based on wages; it is to cut out of the construction market those mechanical firms which UNION is either unable, or its

[2] See Brief of Air-Conditioning and Refrigeration Institute, et al, Amici, at pp. 13-20, and *Local 636, United Ass'n v. NLRB*, 430 F. 2d. 906 (D.C. Cir. 1970).

agents are too lazy to organize by the methods allowed by the National Labor Relations Act (NLRA). For whatever reasons UNION has failed to organize the employees of some mechanical contractors, it has skipped the employer-employee relationship and forced general contractors to boycott not some, but all firms from Dallas to the Oklahoma border who are not parties to its MASTER AGREEMENT. If any plumbing contractor refuses to acquiesce to the dictated terms of UNION, he is denied the right to do business with CONNELL and other general contractors who have agreed with UNION to boycott, regardless of the wishes of the employees affected by the boycott.

A key factor in the subject agreement which goes to both labor and anti-trust issues is the total lack of an employer-employee relationship. Both UNION and AFL-CIO evade this central issue. For example, UNION makes the bold statement that the facts of this case are indistinguishable from those in *Suburban Tile Center v. Rockford Bldg. Trades Council*, 354 F. 2d 1 (7th Cir. 1965) (Resp. Br. p. 5). After quoting extensively from *Suburban Tile* at pages 29-32 of its Brief, UNION itself quotes the distinguishing factor between this case and *Suburban*, stating:

> "The Seventh Circuit rejected that anti-trust claim because:
>
> > 'A construction subcontracting agreement has been held to be a mandatory subject of collective bargaining.' " (Resp. Br. p. 31, quoting from 354 F. 2d 3).

The distinguishing factor in *Suburban* is, of course, the collective bargaining relationship, which is totally absent in this case.

On the issue of the construction industry proviso to § 8(e) of the NLRA, UNION favors and advances the Third Circuit opinion in *Essex County Carpenters v. NLRB*, 332 F. 2d 636 (3rd Cir. 1964), which also involved the employer-employee relationship. The entire dispute in *Essex* arose out of negotiations for a new collective bargaining agree-

ment. If there had been no basis for collective bargaining in *Essex*, and had the case involved antitrust allegations, the Third Circuit would have held that the union forfeited its antitrust immunity.

In fact, on July 2, 1974, in *Conley Motor Express, Inc. v. Russel, et al*, 500 F. 2d. 124 (3rd Cir. 1974), the Third Circuit considered the issue of picketing by the Fraternal Association of Steelhaulers (FASH) outside of any employer-employee relationship. One question in that case was whether or not FASH was a labor organization and was thus exempt from the anti-trust laws. The Third Circuit stated:

> "Even assuming arguendo that FASH is a labor organization' and appellants are seeking traditional labor objectives, *appellants have nonetheless not shown the preliminary requisite for exemption from the anti-trust laws, i.e., that their dispute with Conley involves an employer-employee relationship.*" 500 F. 2d 126 (emphasis added).

After analyzing the pertinent provisions of the Clayton and Norris-LaGuardia Acts, the Third Circuit found no anti-trust immunity for FASH, concluding:

> "Regardless of how appellants may seek to characterize their objectives in picketing, *appellants have failed to show that the employer-employee relationship forms the matrix of their controversy with Conley.* Therefore, we are satisfied that the district court did not abuse its discretion in granting the preliminary injunction." 500 F. 2d. 127 (emphasis added).

UNION seeks to further confuse the Court as to the "intent of Congress concerning the subject agreement by contending that such agreements were commonplace in the construction industry prior to 1959 when § 8(e) was added to the NLRA.

By Order dated February 22, 1973, the Court of Appeals below directed counsel for all parties, including Amici Associated General Contractors and the AFL-CIO Building Trades Department, which represented all of its various affiliated International Building Trade Unions throughout

the United States "to file simultaneous memorandums pointing out all relevant sources of information which would disclose the bargaining practices being followed in the construction industry concerning the subcontractor agreements where the union seeking the agreement *did not have or seek a collective bargaining agreement* with the general contractor, as of the date that the Labor-Management Reporting and Disclosure Act of 1959 P. L. 86-257 was adopted." (emphasis added.).

In response to this Order, neither CONNELL, UNION, nor Amici could furnish the Court with a single instance in which the type of subcontractor agreement involved herein had been used or was in existence prior to such 1959 amendments.

Indeed, Judge Clark, in his dissenting opinion, specifically stated:

> "This court requested supplemental briefs from all the parties and Amici as to the pattern of bargaining practices utilized in the industry prior to the Landrum-Griffin amendments in 1959. *In response to this specific inquiry the union was unable to point out any source of information which would show that subcontractor contracts such as the one in this case were even occasionally utilized in the industry prior to 1959*, muchless so common a practice that we could assume Congress intended to preserve that part of the pattern of collective bargaining in the industry.
>
> In light of the total lack of any evidence to support the proposition that Congress intended to exempt this wideranging type of secondary behavior from the general rules, and considering the probable harm of extensive picketing of neutral parties by various, possibly, rival, locals for the purpose of securing recognition of bargaining status from virtually all subcontractors in a given area, I feel compelled to reach the conclusion that this conduct is not protected by the proviso." 483 F. 2d. 1182 (emphasis added).

UNION asks this Court, although it could furnish no evidence of the existence of any such agreements when so ordered by the Court below, to find that certain unidentified, undefined and unproduced subcontractor agreements, which may or may not have resulted from a collective bargaining relationship, show a pattern of bargaining for agreements of the kind involved herein prior to the 1959 amendments. CONNELL urges that Judge Clark's finding is correct. Any other finding would be based on untested hearsay evidence outside the record of this case.

UNION goes so far as to quote a statement of the General Counsel of the National Labor Relations Board wherein the General Counsel quotes from the case of *Dallas Building Trades Council v. NLRB*, 396 F. 2d. 677 (D. C. Cir. 1968) at page 682, the following:

> "* * * Congress intended by means of Section 8(e) to preserve the status quo of bargaining in the construction industry; and, in 1959 'umbrella' agreements like the one proposed here were, as they are today, commonplace, for collective bargaining is traditionally conducted at several levels in the construction industry * * *" (Resp. Br. pp. 25-26).

A reading of the *Dallas Building Trades* opinion reveals that this statement relied on by the General Counsel is nothing more than a statement of the Trades Council's argument by the D.C. Circuirt Court. The paragraph from which the General Counsel draws his reliance begins:

> "The Council's principal argument is * * *"[3]

UNION further attempts to evade and confuse the lack of a collective bargaining relationship by quoting out of context a sentence of Senator McNamara that the proviso covers all forms of contracting and subcontracting clauses in agreements between building and construction contractors and building trades unions (Resp. Br. p. 27). The very paragraph

[3] This error of the NLRB General Counsel is only a minor example of the brittle logic contained in his Memorandum attached as Appendix A to Resp.'s Brief. The Memorandum is discussed infra at pp. 9-10 and in Appendix A to this Reply Brief.

from which UNION places reliance and lifts one sentence ends with the following sentence:

> "This is all a question to be covered by the collective bargaining agreement." II Leg. Hist. 1959, 1815 [4]

UNION also seeks to evade the consequences of the MASTER AGEEEMENT's favored nations clause by contending that issue is moot because the clause was dropped in 1973 negotiations (Resp. Br. 10, fn. 3). This clause has been in UNION's collective bargaining agreements for many years prior to the time CONNELL was made a vehicle for transmitting it to mechanical contractors. The illegal clause existed at the time UNION commenced its actions herein and also at the time of trial in a subsequent MASTER AGREEMENT. UNION's longstanding "favored nations" agreement with the local multiemployer group was not dropped until after this case had been argued and submitted to the Court of Appeals. UNION's dropping of the favored nations clause is mere "window dressing" and an attempt to advance form over substance, for UNION still has and will execute only one form of collective bargaining agreement with mechanical contractors. UNION's Business Agent testified at the trial of this case that UNION would not vary the terms of its established MASTER AREA AGREEMENT (A 73-74). The issue is not moot. The restraint of trade continues outside of any employer-employee relationship, and the lack of any possible legitimate union interest prevails in spite of the attempts of UNION and AFL-CIO to write around the nature of the subject agreement.

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[4] See also remarks of Congressman Thompson discussing the same questions wherein he concludes:

> "This is all a question to be covered by the collective bargaining agreement." II Leg. Hist. 1959, 1816

These statements of the proponents of the proviso after its enactment as well as the entire legislative history of the 8(e) proviso compel the finding that it was only to apply within the context of a collective bargaining relationship.

II.

UNION'S MISCONSTRUCTION OF THE § 8(E) PROVISIO OF THE NLRA

UNION admits that this antitrust case turns on the meaning of the NLRA (Resp. Br. p. 11), and advances its defense that the agreement is lawful under the construction industry proviso to § 8(e). (Of course the entire NLRA must be examined to determine whether or not UNION's actions are legitimate interests.)

CONNELL's position on the § 8(e) proviso is set forth in its Brief on the Merits at pages 33-43;[5] however, limited response is made to UNION's misconstruction of the proviso.

UNION correctly states that various circuit courts rejected the NLRB's unanimous position[6] that picketing was not to be allowed in obtaining an 8(e) agreement in the construction industry. It is respectfully submitted that these circuit courts ignored the legislative history on the proviso, as well as the meaning of this Court's *Sand Door*[7] decision.

The authority relied on by UNION (Resp. Br. p. 15) begins with the Ninth Circuit reversal of the NLRB's *Colson & Stevens* decision in *Construction, Production & Maintenance Laborers Union v. NLRB*, 323 F. 2d 422 (9th Cir. 1963). That decision reveals a lack of review of the applicable legislative history. Unfortunately the error of that decision was relied on by the Third Circuit in *Essex County Carpenters*, supra, which decision also lacks a discussion of the legislative history of the proviso. Thereafter the various circuit courts cited each other, and the error of allowing coercion to obtain a hot cargo clause was perpetrated until the NLRB gave in and reversed its well reasoned *Colson & Stevens* decision in *Centlivre Village Apartments*, 148 NLRB 854 (1964), prior to this Court's examination of the issue.

[5] See also Amici AGC Brief at pp. 27-41 and Amicus U.S. Chamber Brief at pp. 19-33.

[6] *Colson & Stevens Construction Co.*, 137 NLRB 1650 (1962).

[7] *United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958). This case sanctioned a voluntary boycott if it arose in a collective bargaining relationship. The purpose of the proviso was to retain only this right for construction unions.

The NLRB's erroneous decision in *Centlivre* then becomes UNION's building block as well as that of the General Counsel (App. A to Resp. Br.); however, the NLRB did *not* pass on the legality of the clause in that case as the Board stated in footnote 11 at 148 NLRB 856.

However, even if coercion should be allowed to obtain a hot cargo agreement, the § 8(e) proviso only applies within an employer-employee relationship, as set forth in CONNELL'S Brief at pages 36-43. UNION, unable to cite authority to the contrary, resorts to confusion by citing a limited sentence of the D.C. Circuit opinion in *Dallas Bldg. and Const. Trades Council v. NLRB*, supra, that "picketing is permissible if the coverage of the proposed contract is limited to the type of work which is never performed by the general contractor's own employees". (Resp. Br. p. 24). The quoted language is *obiter dictum* from footnote 8 to the Court's Opinion. 396 F. 2d at 682, fn. 8.

UNION then relies on the NLRB General Counsel's refusal to issue a Complaint in *Hagler Construction Company*, NLRB Case No. 16-CC-447, (App A to Resp. Br.) Actually the same decision of the General Counsel was rendered in several companion cases, including *Ponsford Brothers*, NLRB Case Nos. 28-CC-417, 28-CC-431 and 28-CE-12.

Although the General Counsel's Memorandum is one man's self-serving statement to justify his refusal to act, CONNELL has no objection to its being submitted by UNION. Indeed this decision is the best reason why this Court should decide the § 8(e) questions involved in this case.

After taking the appeals in *Hagler* and *Ponsford* under advisement for twenty (20) months, and after the Petition for Certiorari was filed herein, the General Counsel finally refused to issue Complaints in those cases. In spite of the well reasoned dissent of Justice Clark[8] and a strong plea from

the majority of the Court of Appeals below, the General Counsel has, in effect, said:

> The Fifth Circuit has misread the law; I have decided that there is no need for the Board and the Courts to judge these issues on a fully developed record; I have spoken and my action is unreviewable by any court in the land.

In addition to the arguments contained in the Briefs of CONNELL and Amici which reveal the fallacy of the General Counsel's legal position, CONNELL attaches hereto as Appendix "A"[9] an excellent article written by Messrs. Leonard S. Janofsky and Andrew C. Peterson in response to the NLRB General Counsel's decision. This article reveals how the General Counsel has overruled this Court's decision in *Denver Bldg. Trades*, 341 U.S. 675, as well as others.

III.

ANTITRUST LAWS AND REMEDIES ARE NOT PREEMPTED BY SECTION 303

UNION, in its Brief, contends (for the first time in this case) that Section 303 of the NLRA is the exclusive remedy available to any person seeking relief from the effects of illegal secondary union activity (Resp. Br. pp. 34-43). UNION's theory that Congress intended for the NLRA to be the exclusive means of regulating all union secondary activity is in direct conflict with the basic rules of statutory construction. As this Court stated long ago in *U.S. v. Borden Co.*, 308 U.S. 188 (1939):

> "It is not sufficient, as was said by Mr. Justice Story in Wood v. United States, 16 Pet. 342, 362, 363, 10 L. Ed. 987, 'to establish that subsequent laws cover some or

[8] Justice Clark's interpretation of the 8(e) proviso is found at 483 F. 2d 1180-1182.

[9] THE EXERCISE OF UNREVIEWED ADMINISTRATIVE DISCRETION TO REVERSE THE UNITED STATES SUPREME COURT, to be published in 25 CCH LABOR LAW JOURNAL, No. 12 (Dec. 1974).

> even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary.' There must be 'a positive repugnance between the provisions of the new law and those of the old; and even then, the old law is repealed by implication only, pro tanto, to the extent of the repugnancy.'" Id at 198-199.

See also *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963); *California v. Federal Power Comm.*, 369 U. S. 482 (1962); *Georgia v. Pennsylvania* R.R. Co., 324 U. S. 439 (1945). These cases show one very clear rule that is applicable in this case, i.e., UNLESS CONGRESS EXPRESSES ITS CLEAR INTENT TO LIMIT REGULATION OF AN ACTIVITY TO ONE STATUTORY SCHEME, THEN NO SUCH INTENT WILL BE IMPLIED.

Thus, the proper question on this issue is not whether Congress intended to regulate secondary activity under the NLRA, but, rather, did Congress, in doing so, intend to repeal the antitrust laws as to secondary activity if that activity violates the Sherman Act. CONNELL submits that nothing in either the labor statutes or their legislative history demonstrates such Congressional intent. In fact, the legislative history, including that quoted by UNION, shows the clear intent of Congress to maintain the qualified immunity from antitrust laws rather than remove it entirely. Instead of removing all antitrust immunity for any union secondary activity, which in most cases would have been killing a fly with a sledgehammer, Congress established a more practical system of regulation. But Congress left intact the concept that union activity, including secondary, would become subject to antitrust regulation if a union overstepped the bounds of its legitimate labor interests or conspired with a non-labor party, such as CONNELL, to violate the Sherman Act.

The point is reinforced when it is noted that secondary activity is only one of many union activities defined and regulated as unfair labor practices in the NLRA. Also, just

as with secondary activity, Congress has provided both administrative and other remedies for those unfair labor practices. The provision of those remedies, however, has never been interpreted to immunize the activities of unions or employers or any other person or entity from other federal or state laws merely because they were regulated by the NLRA.

The failure of a union to fairly represent employees is one example of such condemned activity. The fact that specific remedies are established in the NLRA, however, does not serve to immunize a union from suit and liability under various Federal Civil Rights statutes against discrimination. See, e.g., *Alexander v. Gardner-Denver Co.*, ... U.S. ....., 94 S. Ct. 1011 (1974). It is also noteworthy that the contract condemned in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), was a collective bargaining agreement which is heavily shielded by the NLRA. That fact, however, did not serve to shield that agreement from antitrust laws.

UNION relies heavily on this Court's decision in *Local 20, Teamsters, etc. Union v. Morton*, 377 U.S. 252 (1964) (Resp. Br. p. 20). CONNELL does not dispute the validity of the *Morton* decision, but does submit that it has no application in this case and, in any event, UNION's interpretation of that decision is overbroad.

The first and most significant point to consider as to *Morton* is that there was no issue of antitrust violation involved in the case. *Morton* involved what might be termed "garden variety" secondary activity and a question of the damages normally flowing from such commonplace secondary activity. The case now before this Court, however, does not deal with such matters. Rather, this case involves violations of the antitrust laws by union activity that far exceeds the normal bounds of secondary activity which was within the contemplation of Congress when it enacted § 303. Were the basic issue before this Court a question of whether UNION was engaged in secondary activity, then *Morton* might have some application. The issue however, is whether UNION has so overstepped the bounds of legitimate union activity as to violate state and federal antitrust laws, and CONNELL

seeks relief from those antitrust violations and not from ordinary secondary activity.

Even if *Morton* did have some place in the consideration of this case, it certainly would not support UNION's theory that § 303 has totally preempted the field of secondary activity. Indeed, this theory has been specifically rejected. In the case of *Price v. United Mine Workers*, 336 F. 2d 771 (6th Cir. 1964), cert. den. 380 U.S. 913 (1965), the issue was raised in the context of whether state laws giving rights of recovery for personal and other injuries flowing from secondary activity were preempted by § 303. After reviewing the *Morton* decision, the court in *Price*, held that § 303 is applicable *only* when money damages to business or property flowing from peaceful illegal secondary activity are sought. See also *Gulf Coast Bldg. & Const. Trades Council v. F. R. Hoar & Son, Inc.*, 370 F. 2d 746 (6th Cir. 1967).

The very nature of § 303 argues against UNION's position. § 303 is strictly compensatory in nature and has no regulatory aspect or coverage. See, e.g. *Landstrom v. Teamsters Local Union No. 65*, 476 F. 2d 1189 (2nd Cir. 1973); *Iodice v. Calabrese*, 345 F. Supp. 248 (D.C.N.Y. 1972); *Local 20, Teamsters, etc. Union v. Morton*, supra. To say that Congress outlawed an activity and then proceeded to cut off all civil remedies except compensatory damages against unions only is obviously ridiculous. *United Mine Workers v. Laburnum Corp.*, 356 U.S. 634 (1954). It is equally ridiculous to say, as does UNION, that by enacting § 303, Congress intended to protect unions from ruinous damage awards and yet intended to deny a party any right of action which could prevent those damages from being incurred in the first place. Also, to adopt UNION's theory would be to say that if union secondary activity violated antitrust or other laws, the offending union would be immune while other participants, no matter how involved, would be left to bear the burden of those other laws. In this case, for example, UNION says it can force CONNELL to violate both State and Federal antitrust laws, deny CONNELL any right of action to protect itself, and then UNION escapes while CONNELL

is left to bear any and all punishment. CONNELL submits that Congress could not have intended such a result.

IV.

STATE ANTITRUST ISSUES

UNION takes the position that State Antitrust laws, or, for that matter, any state law, cannot be applied in this case for the reason that a labor union and labor issues are involved. This position is contrary to past decisions of this Court on the preemption doctrine. As this Court and other Federal Courts have consistently held, state laws are subject to preemption *only* when those laws are in real and direct conflict with particular federal legislation, or where, in a particular case, the application of state law would defeat or negate federally protected rights. See, *Watson v. Buck*, 313 U.S. 387 (1941); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Hanna Mining Co. v. Marine Engineers Beneficial Ass'n., Dist. 2*, 382 U.S. 181 (1965). The very case relied on so much by UNION, *Teamsters Local 34 v. Oliver*, 358 U.S. 283 (1959), is in fact very clear on this point. Throughout the decision in that case, the Court spoke of the preemption of state law *only when it was inconsistent* with federal law.

Of much greater interest is the fact that UNION, in its Brief, completely ignored this Court's decision in *Hanna Mining Company v. Marine Engineers*, supra. CONNELL submits that the *Hanna* case is not only much closer to the facts in this case than is *Oliver*, but is truly dispositive of the preemption issue. The key point is that in *Hanna* this Court ruled that the preemption doctrine did not protect a labor union's activities from state law when those activities did not involve an employer-employee relationship. Precisely the same situation is now before the Court. The UNION'S smokescreen of union goals elsewhere does not offset the fact that there are no employees, no wages, hours nor working conditions involved in this case. Under such circumstances state law should not be preempted because

it does not interfere with an activity protected by federal law and is not inconsistent with any federal law.

CONCLUSION

CONNELL is not asking this Court to rule that all secondary activity violates state and federal antitrust laws or that every union engaged in such activity loses its antitrust protection under the Norris-LaGuardia and Clayton Act. CONNELL does, however, submit that the secondary activity inherent in this case goes far beyond what might be considered "normal" or "commonplace" secondary activity and is, in fact and in law, so flagrant, widespread and misdirected that it is wholly outside the realm of normal labor management relations and is really destructive of the very balance Congress and the Courts have established between labor and management and between labor and antitrust laws.

Unions generally become involved in improper secondary activity as an adjunct to an active labor dispute involving employers and employees. In such cases there is a realistic union interest to protect unions from the antitrust laws and the regulatory process of the NLRA acts most effectively to protect neutral employers. UNION is not acting here to further its legitimate interests and it is not acting to protect any of its rights as established by federal labor legislation; instead, UNION is acting to avoid the legal obligations imposed on all labor organizations by federal law and, also, to avoid the legal rights of employers and employees as established by such laws.

Respectfully submitted,

Joseph F. Canterbury, Jr.
Counsel for Petitioner

OF COUNSEL:
SMITH SMITH DUNLAP & CANTERBURY
BOWEN L. FLORSHEIM
On the Brief

CERTIFICATE OF SERVICE

This is to certify that on the ..... day of November, 1974, three true and correct copies of the foregoing Petitioner's Reply Brief were served on Counsel for Respondent by depositing the same in the United States Mail, with First Class postage prepaid, and addressed to Mr. David R. Richards, 600 West 7th Street, Austin, Texas 78701.

.....

Joseph F. Canterbury